Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

RICHARD M. PATTERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS D. HUGHES, IV
616 North Washington Street
Alexandria, VA 22314
(703) 836-9590
Attorney for Petitioner

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the Petitioner's right to a fair trial under the Sixth Amendment to the Constitution of the United States was compromised because of the ineffective assistance of counsel.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
CONCLUSION	8

APPENDIX:

A. Per Curiam of the United States Court of Appeals for the Court Circuit dated May 5, 1999	1a
B. Memorandum Opinion and Order of the U.S. District Court for the Eastern District of Virginia in *United States* v. *Patterson*, Criminal No. 97-60-A and Civil Action No. 98-355-A dated October 8, 1998	3a
C. Order of the United States Court of Appeals for the Fourth Circuit dated August 9, 1999	12a

TABLE OF AUTHORITIES

Cases	Page
Brady v. *Maryland*, 373 U.S. 83 (1963)	8
Coleman v. *Alabama*, 399 U.S. 1 (1970)	4
Dew v. *United States*, 558 A.2d 1112 (D.C. 1989)	4
McMann v. *Richardson*, 397 U.S. 759 (1970)	4
Michigan v. *Jackson*, 475 U.S. 625 (1986)	4
Moran v. *Burbine*, 475 U.S. 412 (1986)	4
Scott v. *Illinois*, 440 U.S. 367 (1979)	4
Strickland v. *Washington*, 466 U.S. 668 (1984)	4, 7, 8
U.S. v. *Debango*, 780 F.2d 81 (D.C. Cir. 1986)	8

Other Authorities

6th Amendment	2, 4
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2255	3, 6, 8

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PETITION FOR WRIT OF CERTIORARI

Richard M. Patterson hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated May 5, 1999, is appended as Appendix B hereto. Also appended (Appendix C) is the Order and Memorandum Opinion of the district court dated October 8, 1998 in *United States* v. *Patterson*, Cr. No. 97-60-A and Civil Action No. 98-355-A, James C. Cacheris, J.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 5, 1999. Petitioner filed for *en banc* rehearing June 6, 1997. On August 9, 1999, the Court of Appeals denied rehearing and rehearing *en banc*. A copy of the Order on rehearing is appended hereto as Appendix A.

Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTION PROVISION INVOLVED

The Sixth Amendment provides in pertinent part that the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On February 19, 1997, a grand jury sitting in the Eastern District of Virginia returned a single count indictment charging Petitioner with kidnaping.[1] The indictment charged that from on or about January 28, 1997 to on or about January 31, 1997, Petition kidnaped Keith R. Cottrell, moving him between the State of Maryland and the Commonwealth of Virginia.

Petitioner was arraigned on March 3, 1997, pleaded not guilty and demanded trial by jury. Thereafter, Petitioner moved to suppress two confessions he made on the day of his arrest, and on April 11, 1997, following an evidentiary hearing in the district court (Spencer, J.), the motion was denied.

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[1] This case was originally charged on a criminal complaint against four (4) defendants, Michael Patterson, Kenneth Maichle, David Hess and Petitioner but this complaint was dismissed.

Trial began on April 22, 1997. At the conclusion of the government's case, Petitioner moved for a judgment of acquittal, which was denied. Petitioner thereafter put on a case in defense, but did not testify, nor were certain relevant witnesses called either. On April 23, 1997, a jury returned a finding of guilty against Petitioner on the kidnapping charge.[2]

On April 29, 1997, Petitioner moved for a new trial or for a judgment of acquittal pursuant to Federal Rules of Criminal Procedure 33 and 29, respectively. This Court denied the motions on June 18, 1997.

On August 1, 1997, Petitioner was sentenced to a 121 months imprisonment, five years supervised release and ordered to pay a $100 special assessment. Petitioner filed his notice of appeal on August 6, 1997. On September 2, 1997 Petitioner moved to set aside the conviction pursuant to 28 U.S.C. § 2255. Because his appeal was pending, this Court denied the motion without prejudice on September 8, 1997. Thereafter, Petitioner moved to dismiss his appeal, and on January 12, 1998, the Court of Appeals for the Fourth Circuit dismissed it with prejudice.

On March 13, 1997, Petitioner filed his 28 U.S.C. § 2255 petition with the district court which was denied without a hearing by the Court on October 8, 1997 and timely filed his appeal to the Fourth Circuit Court of Appeals. The Court Circuit on May 5, 1999 dismissed Petitioner's 28 U.S.C. § 2255 Motion by denying his certificate of appealability and Petitioner sought both a rehearing and rehearing *en banc*. On August 9, 1999 the Fourth Circuit denied both requests for rehearing.

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2 David Hess was charged and indicted for kidnapping in *United States* v. *David Hess*, Cr. No. 97-00187-A and found not guilty by a jury on July 11, 1998.

REASONS FOR GRANTING THE PETITION

Exceptional Importance

The Sixth Amendment guarantees the right to counsel in all criminal prosecutions resulting in actual imprisonment. *Scott* v. *Illinois,* 440 U.S. 367 (1979). This constitutional right extends to all "critical stages" of the proceedings against the defendant. *Coleman* v. *Alabama,* 399 U.S. 1 (1970), as soon as the right to counsel "attaches" with the filing of formal criminal charges. *Dew* v. *United States,* 558 A. 2nd 1112 (D.C., 1989); *Moran* v. *Burbine,* 475 U.S. 412, 422 (1986); *Michigan* v. *Jackson,* 475 U.S. 625 n. 3 (1986). "[T]he right to counsel is the right to effective assistance of counsel." *Strickland* v. *Washington,* 466 U.S. 668, 686 (1984) (quoting *McMann* v. *Richardson,* 397 U.S. 759 (1970)).

The constitutional right to counsel as set forth above clearly demonstrates that it is the linch pin to a fair and judicious system of criminal justice. Accordingly, all claims of ineffective assistance should be considered cases of exceptional importance particularly where the errors below demonstrate a manifest injustice to Petitioner.

Petitioner contends that he was denied a fair trial because of defense counsel's failure to call certain key exculpatory witnesses.

The standard which governs claims of ineffective assistance of counsel was articulated in *Strickland* v. *Washington,* 466 U.S. 668 (1984):

> First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. The Court states that, [t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. The Court stressed that the "proper standard for attorney performance is that of reasonably effective assistance," defined as "reasonableness under prevailing professional norms.'" *Id.* at 687-88. As a result, "[i]n any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. The Court must make this reasonableness determination based upon "the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Although the Supreme Court cautioned that the court "should recognize that counsel is strongly presumed to have rendered adequate assistance," *Id.* at 690, it is also stressed that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Id.* at 693. Rather the defendant

> must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . Some errors will have had a pervasive effect of the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as given and taking due account of the effect of the errors on the remaining findings, a court making the

> prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 695-96.

The Fourth Circuit references and relies on the October 8, 1998 Memorandum Opinion of the district court in its basis for denying Petitioner's 28 U.S.C. § 2255 motion and therefore Petitioner in his petition will address the aforementioned concerns from the district court's memorandum opinion.

The district court, in its memorandum opinion, states that trial counsel's failure to interview and call the victim's roommate Hans Nearhoof to testify does not constitute ineffective assistance of counsel. Moreover, the district court states further that trial counsel's failure to interview and call to testify the mailman, Robert Barnhouse, if done, would not have changed the outcome of Petitioner's trial.

The failure of defense counsel to call witnesses, Hans Nearhoof and Robert Barnhouse, in behalf of Petitioner at his trial, was damaging and prejudicial. These witnesses were under subpoena and present at the trial of Petitioner.

Specifically, it is clear that Hans Nearhoof, the roommate of the alleged victim, Keith Cottrell, would have been an exculpatory witness on behalf of the Petitioner. He would have shed great light as to the negative credibility and reputation of Cottrell in the social and business community for truth and veracity. He would have also explained to the jury how the injuries occurred to Cottrell [falling down the staircase] and the fact that he maintained himself in a drunken stupor. This alone would have assisted the Petitioner in "off setting" the allegations of the victim on how the injuries were sustained to his but-

tocks and back; placed sobriety before the jury as an issue relating to veracity or even the ability to recall and remember facts.

Robert Barnhouse, the mailman, was an important eye witness to the incident. Barnhouse [a 6'6" 290lb. fortiesh man] testified at the Hess trial that there was nothing unusual with the departure of the alleged victim, Cottrell, from his residence and that he would have been readily available to assist him in the event that Cottrell had requested assistance; that he did not see Cottrell being forced into Michael Patterson's Jaguar. All of this testimony would have been readily available to defense counsel at the Petitioner's trial. It should further be noted that Cottrell pictured this government employee, as an old and pudgy mailman who would have been no assistance to him in the event that he chose to call out for help. These witnesses were called, however, at the trial of David Hess and testified as set forth above. Mr. Hess was acquitted.

The above notwithstanding, the district court does not consider the above within the context of the acquittal of co-defendant, David Hess and as such those statements of the district court fly in the face of the documented record of these two (2) proceedings. Specifically, as the Supreme Court held in *Strickland* v. *Washington Id.* At p. 695 that the Defendant . . . must show that there is a reasonable possibility that but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Petitioner respectably suggests that had the witnesses Nearhoof and Barnhouse been called to testify at Petitioner's trial that there is more than "reasonable possibility" that the outcome of his trial would have been different. One need only look at the subsequent trial of co-defendant David Hess where these two (2) witnesses

testified and Mr. Hess was found not guilty of kidnaping by the jury of the same charge Petitioner was found guilty. As such, the "but for" requirement of *Strickland Id.* is not speculative but a documented record of fact.

For an attorney to specifically walk away from exculpatory evidence, when that very evidence is provided to the attorney by the government under *Brady* [3] is particularly egregious. It should be further remembered that *Brady* is a constitutional safeguard. A defendant need not ask for it magnifies the importance of *Brady* material. Failure to call governmental *Brady* witnesses clearly must be ineffective. Consequently, it must be concluded that trial counsel's conduct falls well below the objective standard of "reasonableness" articulated in *Strickland, Id.* Therefore it follows that trial counsel's decision to not call these witnesses cannot be considered a tactical trial decision. See *U.S.* v. *Debango,* 780 F.2d 81 (D.C. Cir. 1986). Perforce to note therefore that Mr. Hess' acquittal clearly and empirically establishes that a different result would have been obtained but for defense counsel's representational errors which were not reasonable in accordance with the Supreme Court's ruling in *Strickland* v. *Washington,* 466 U.S. 668 (1984).

CONCLUSION

The record reflects that of the four (4) individuals originally charged in the indictment involving Cottrell only one, the Petitioner, has had to face a penal consequence. The Presentence Report reveals that if any culpability is to be allocated among these four (4) individuals, the least culpable is the Petitioner. David Hess went to trial

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[3] *Brady v. Maryland,* 373 U.S. 83 (1963), and its progeny require that the government disclose to the defendant, upon request, evidence in its possession that is material and favorable to the accused.

on the same charge Petitioner stands convicted of and was acquitted by a jury on evidence that was not introduced but available at Petitioner's trial. Our system of criminal justice is not perfect. But this imperfection cannot be countenanced. Accordingly, based on the above, Petitoner prays that the Court grant his Petition.

Respectfully submitted,

THOMAS D. HUGHES, IV
616 North Washington Street
Alexandria, VA 22314
(703) 836-9590
Attorney for Petitioner